



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MDV-66/48899

PRELIMINARY RECITALS

Pursuant to a petition filed April 19, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Washington County Dept. of Social Services in regard to Medical Assistance (MA), a hearing was scheduled for July 20, 2001, at West Bend, Wisconsin. At the request of petitioner, hearings set for May 16, 2001 and June 20, 2001 were rescheduled. A telephonic prehearing conference was held between the parties and this ALJ on July 12, 2001. During that prehearing both parties agreed that a hearing was not necessary in Case No. MDV-48899 because no facts were in dispute. As a result, the hearing schedule for July 20, 2001 in Washington County was cancelled. The parties agreed that the issue in the dispute was a legal one regarding whether or not the petitioner had divested assets that resulted in his ineligibility for MA.

During that same prehearing, both parties agreed to stay the hearing in Case No. MRA-66/49090 because the issue of cost of care contribution was being addressed by the Washington County Circuit Court in Case No. 01-CV-0368. See Exhibit 3 (this ALJ's 7-12-2001 Prehearing Conference Report).

At the request of the parties, responsive briefs were filed. Washington County Assistant County Attorney Christine Ohlis submitted the briefs at the request of the county agency. The initial brief which was timely filed by each party included eight (8) exhibits attached to the petitioner's brief (these Exhibits shall be referred to in the Findings of Fact below). The responsive briefs were timely filed at the Division of Hearings and Appeals (DHA) by the August 22, 2001 deadline. See Exhibit 3.

In multiple letters from Attorney Robert Alexander, the petitioner (with notice to the county agency) requested that this ALJ delay the writing of this decision in order to provide additional opportunity for trying to "negotiate a settlement of this matter." In his February 8, 2002 letter, Attorney Alexander once again requested that no written decision be issued until after March 11, 2002. The county agency or its legal counsel submitted no objections to these delays. The March 11, 2002 time period expired and no settlement agreement was received at DHA from the parties. Therefore, this decision is being issued.

In a January 24, 2001 hearing before DHA, the same petitioner, (petitioner), represented by the same counsel, Attorney Robert Alexander, appeared before ALJ Ken Duren in Case No. MED-66/47172. This case involved many of the same facts as the instant case, and also addressed the issue as to whether the county agency had correctly denied petitioner's MA application (but that decision focused on excess income, not excess assets as in the instant appeal). ALJ Duren issued a proposed decision on February 2, 2001. In a March 14, 2001 Final Decision, the Secretary amended that decision and adopted the decision as the final order of the Department. The petitioner appealed this final decision to the Washington County Circuit Court in Case No. 01-CV-0368.

The issue for determination is whether the county agency correctly denied petitioner's MA application due to the divestment to an irrevocable trust.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Represented by:

Attorney Robert G. Alexander
Alexander & Klemmer, S.C.
2675 North Mayfair Road, Suite 304
Wauwatosa, WI 53226

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Attorney Christine Ohlis, written submission
Office of County Attorney
432 E. Washington Street
P.O. Box 1986
West Bend, WI 53095-7986

By: Maxine Ellis, ES Supervisor, ESS
Washington Co Dept Of Social Services
333 E. Washington Street
Suite 3100
West Bend, WI 53095

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN: xxx-xx-xxxx, CARES # xxxxxxxxxxx) is an institutionalized resident of Washington County who entered a nursing home during March, 2000. The petitioner is 71 years old and was born on September 10, 1930. The petitioner's wife resides in the community.
2. On June 15, 2000, the petitioner applied for Institutional MA. That application was denied due to three reasons: excess assets in the form of an IRA account of \$261,774.20; failure to complete verification; and a determination that he had divested \$150,000 into an annuity.
3. On October 12, 2000, the petitioner re-applied for Institutional MA seeking backdated eligibility.
4. This application was denied due to the county determination that petitioner had income over the MA income eligibility limits. A fair hearing before ALJ Kenneth Duren was held on January 24, 2001 in Case No. MED-66/47172. ALJ Duren issued a proposed decision in this matter on February 2, 2001 which remanded the case to the county for redetermination and thereby reopened the petitioner's MA application process.
5. On February 21, 2000, the petitioner and his wife established the (xxxxx) Irrevocable Trust Agreement. See Exhibit 1. This 20-page irrevocable trust document named the petitioner and his wife as initial trust income beneficiaries and (xxx) and (xxx) as principal beneficiaries.

6. On February 21, 2000, the petitioner and his wife sold to the Irrevocable Trust Agreement (dated February 21, 2000) \$150,000 of assets pursuant to a Private Annuity Agreement. See Exhibit 2.
7. Per the terms of the Private Annuity (Exhibit 2), petitioner's wife, as the community spouse, was and is to receive \$1,424.55 per month on the first day of each month (beginning on May 1, 2000).
8. As of March, 2002, the petitioner's wife has a balance of \$135,813.13 remaining to be paid from the Private Annuity as indicated in the amortization schedule attached to Exhibit 2.
9. The county agency sent a March 23, 2001 manual negative notice to the petitioner indicating that petitioner's MA application was denied due to divestment to the Trust pursuant to the MA Handbook sec. 14.12.2. See Exhibit 8.
10. The petitioner filed an appeal with the Division of Hearings and Appeals on April 19, 2001.
11. The county agency sent a May 2, 2001 memo to the petitioner explaining the county's determination that petitioner's February 21, 2000 Irrevocable Trust had divested \$150,000 in funds when those funds were used to purchase a Private Annuity on that same day. As a result, the county determined that the \$150,000 in Trust funds was divested during the "lookback period" (prior to petitioner's MA applications) creating divestment ineligibility from February 21, 2000 until January 1, 2003. See Exhibit 7.

DISCUSSION

A divestment is a transfer of assets for less than fair market value. Sec. 49.453(2)(a), Wis. Stats.; MA Handbook, Appendix 14.2.1. A divestment or divestments made within 36 months (60 months if the divestment is to an irrevocable trust) before an application for nursing home MA may cause ineligibility for that type of MA. Sec. 49.453(1)(f), Stats.; Handbook, App. 14.3.0. The ineligibility is only for nursing home care; divestment does not impact on eligibility for other medical services such as medical care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is specified in sec. 49.453(3), Stats., to be the number of months determined by dividing the value of property divested by the average monthly cost of nursing facility services.

The Wisconsin State statutes, administrative code and MA Handbook all provide directives regarding the classification and treatment of a divestment of assets. Wis. Stat. § 49.453, Divestment of Assets, provides the specifics as follows:

Wis. Stat. § 49.453(2)(a) states:

(2) INELIGIBILITY FOR MEDICAL ASSISTANCE FOR CERTAIN SERVICES.

(a) Institutionalized individuals. Except as provided in sub. (8), if an institutionalized individual or his or her spouse, or another person acting on behalf of the institutionalized individual or his or her spouse, transfers assets for less than fair market value on or after the institutionalized individual's look-back date, the institutionalized individual is ineligible for medical assistance for the following services for the period specified under sub. (3):

1. For nursing facility services.
2. For a level of care in a medical institution equivalent to that of a nursing facility.

(emphasis added)

The Wisconsin Administrative Code § HFS 103.065(4)(a) defines “divestment” as follows:

(4) DIVESTMENT. (a) Divestment resulting in ineligibility. An institutionalized individual or someone acting on behalf of that individual *who disposes of resources at less than fair market value* within 30 months immediately before or at any time after the individual becomes institutionalized if the individual is receiving MA on the date he or she becomes institutionalized or, if the individual is not receiving MA on that date, within 30 months immediately before or at any time after the date the individual applies for MA while institutionalized, shall be determined to have divested. (emphasis added)

The MA Handbook states: “Divestment” is the transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person or his/her spouse or both:

1. For less than the fair market value of the income or asset
2. By an institutionalized person

MA Handbook, Appendix 14.2.1

In this case, the parties stipulated that on February 21, 2000, the petitioner and his wife established the Irrevocable Trust Agreement. See Exhibit 1. The county contended that petitioner’s February 21, 2000 Irrevocable Trust divested \$150,000 in funds when petitioner and his wife sold to the Irrevocable Trust Agreement \$150,000 of assets. See Exhibit 1. The creation of the irrevocable trust and the transfer of funds by the petitioner and her husband into that irrevocable trust on February 21, 2001 were the events that triggered a divestment.

The controlling state statute, Wis. Stat. §49.454, specifically addresses the treatment of trusts for MA purposes. Subsection (1) states that the section applies to a trust if assets of the individual or the individual’s spouse were used to form all or part of the corpus of the trust and the trust was established by the individual or the individual’s spouse. Wis. Stat. § 49.454(3) specifically addresses **divestment of assets to irrevocable trusts**; Subsection (3)(b) states:

Any portion of an irrevocable trust from which, or any income from the corpus from which, no payment could under any circumstances be made to or for the benefit of the individual, is considered to be an asset transferred by the individual subject to s. 49.453. The asset is considered transferred as of the date of the establishment of the trust, or, if later, the date on which payment to the individual was foreclosed. The value of the trust shall be determined for purposes of s. 49.453 by including the amount of any payments made from that portion of the trust after that date.

Irrevocable trusts, are subject to a 60 month “lookback” period for divestment testing, at application, in order to make an initial eligibility determination at all. See, WI Stat § 49.453(1)(f). The trust at issue here falls within the 60 months prior to application. In fact, the February 21, 2000 irrevocable trust was created just four (4) months before petitioner’s first MA application date of June 15, 2000.

A transfer into an irrevocable trust, where the MA applicant/recipient’s assets form the trust, and where there are no circumstances where payments can be made to the applicant/recipient, is described

specifically in 42 U.S.C. 1396p(d)(3)(B)(ii) as being a divestment. See also Wis. Stat. §49.454(3)(b); MA Handbook, App. 14.12.2 (currently renumbered as 14.13.2). 42 U.S.C. 1396p(d)(4) describes exceptions to that rule. Exceptions are so-called Special Needs Trusts, which provide that the state will be repaid any MA payments upon the individual's death, and pooled trusts for disabled individuals. See also Wis. Stat. §49.454(4). The MA Handbook, App. 14.12.3, adds as exceptions annuities, irrevocable burial trusts, and trusts but only trusts established by a will.

The trust established on petitioner's behalf clearly falls into the definition of divestment, and it also does not meet a specified exception. It is the acts of creating the Irrevocable Trust and the funding of that Irrevocable Trust that clearly created the divestment in this case. The MA Handbook provides in pertinent party confirmation that funding of an irrevocable trust is a divestment:

14.13.2 (f/k/a 14.12.2) 'Irrevocable Trusts

An irrevocable trust is a trust that cannot in any way be revoked by the grantor.

The following actions are divestments if they took place during the lookback period or any time after:

1. **An irrevocable trust was created. The divested amount is the total amount of the created trust.**
2. Funds were added to the irrevocable trust. The divested amount is the amount of the added funds.

If either of these actions took place before the lookback period, apply the following rules:

1. Payments to the institutionalized person from trust income or from the body of the trust are income.
2. Payments that could be disbursed to the institutionalized person from trust income or from any portion of the body of the trust but that are not disbursed are available assets.
3. **Payments from the trust to anyone other than the institutionalized person are divestment.**

(emphasis added).

The petitioner's attorney attempted unpersuasively to argue that an irrevocable trust was created but that no funds were transferred into that irrevocable trust (a shell of a trust). The petitioner's attorney did not provide any explanation for why the irrevocable trust was created, i.e. a purpose other than to create MA eligibility for petitioner by making him asset eligible. However, the above MA section makes clear: that the **creation of an irrevocable trust was divestment** whether funded or unfunded at that specific time. The burden of proof to establish that no divestment had occurred was and is clearly upon the petitioner. In other words, the petitioner has the burden to rebut the presumption that divestment was made in contemplation of seeking Medical Assistance. In this case, the irrevocable trust was created on February 21, 2000, the annuity was funded as of that same day, and less than four (4) months later the petitioner applied for institutionalized MA on June 15, 2000 for the first time. The petitioner has failed to rebut the presumption that the creation of the irrevocable trust was part of a scheme to achieve MA eligibility for a person (petitioner) who had rather substantial assets (Finding of Fact #2).

On February 21, 2000, the petitioner and his wife sold to the Irrevocable Trust Agreement (dated February 21, 2000) \$150,000 of assets pursuant to a Private Annuity Agreement. See Exhibit 2. In that private annuity, petitioner's wife, receives \$1,424.55 per month as of May 1, 2000 and those monthly payments appear to have continued to (petitioner's wife). The petitioner contended that the Private Annuity could be considered a fair market value exchange for the \$150,000 paid from the petitioner's Irrevocable Trust to the petitioner's Private Annuity so that no divestment occurred on February 21, 2000.

An MA divestment can be satisfied or ignored pursuant to several itemized exceptions. The only relevant exception here is described in policy as follows:

14.4.0 Exceptions

A divestment that occurred in the lookback period or any time after does not affect eligibility if any of the following exceptions apply:

...

3. The ownership of the property is returned to the person in the fiscal group who originally disposed of it.

MA Handbook, Appendix 14.4.0 (4-1-99). See also, Wis. Admin. Code §HFS 103.065(4)(d)2c (November, 2000).

See also DHA Case No. MDV-66/48085, issued July 18, 2001 by ALJ Nancy Gagnon.

However, the petitioner has not seen a return of the property that he disposed of by establishing the irrevocable trust and the private annuity. An income stream was set up for petitioner's wife (not the institutionalized petitioner who wants to become MA eligible) running from May, 2000 with final monthly payout on August 1, 2013. See Exhibit 2, last page.

The petitioner argued that the annuity was a fair market value exchange because petitioner's wife received an annuity which was worth \$150,000 in total future payments. However, the MA Handbook specifically provides that if an irrevocable trust was created then:

4. **Payments from the trust to anyone other than the institutionalized person are divestment.**

MA Handbook, Appendix 14.12.2, #3.

In this case, the record is uncontested that the payments from the trust-funded annuity are to the community spouse and not the institutionalized person. The county agency correctly determined that the petitioner divested assets and that divestment made the petitioner asset ineligible for institutional MA until January 1, 2003.

In his written briefs, Attorney Alexander contended that the county failed to raise the propriety of the annuity and the trust in earlier notices and therefore had waived its right to deny MA due to divestment. In her written briefs, Attorney Ohlis explained convincingly that the county's denial notices were not defective and that the issue of the propriety of annuity and trust had been raised. See Case No. MED-66/47172, Finding of Fact #2.

However, even if any of those notices were defective, defective denial notices for applicants (i.e., a person not already receiving MA) do not create eligibility for an applicant. Because MA is an entitlement

program, an ongoing recipient of benefits may have her eligibility extended where an agency issues a materially defective discontinuance notice of her ongoing benefits. However, (petitioner) was an applicant in this case and therefore any inadequacy in any notice would not create MA eligibility.

In his briefs, Attorney Alexander raised other issues in an attempt to obfuscate the central problem with his client's MA application – that petitioner created an irrevocable trust during the lookback period and funded that trust with \$150,000 in assets. As this case is denied on that basis, there is no need to address Mr. Alexander's other contentions.

CONCLUSIONS OF LAW

The county agency correctly denied petitioner's MA application due to divestment.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 21st day of
March, 2002

/sGary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
41/GMW